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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. [redacted] 109

J. C. THOMAS and MARTHA THOMAS,
Petitioners,

versus

GEORGE D. PATTERSON,
District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FRANK P. SAMFORD, JR.,
JOHN W. GILLON, and
IRA L. BURLESON
of
SPAIN, GILLON & YOUNG,
804 First National Building,
Birmingham 3, Alabama,
Attorneys for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment in Petitioners' favor of the District Court for the Northern District of Alabama, and remanded the cause to said District Court for further proceedings.

OPINIONS BELOW.

The Opinion and Judgment of the Federal District Court (R. 128-133, Appendix A) is reported in 189 F. Supp. 230. The opinion of the Court of Appeals for the

Fifth Circuit (R. 324, Appendix B), being No. 18,263 of that Court, is not yet reported in the Federal Reporter, but is published in 61-1 U. S. T. C. 9310.

JURISDICTION.

The Judgment (R. 353, Appendix B) of the Court of Appeals was entered on March 16, 1961. A timely application for rehearing (R. 354) was denied on April 12, 1961 (R. 408, Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

The Statute defining gross income, § 61 of the Internal Revenue Code of 1954, 26 U. S. C. 61 (Appendix D);

The Statute defining adjusted gross income, § 62 of the Internal Revenue Code of 1954, 26 U. S. C. 61 (Appendix D);

The Statute defining trade or business expense, § 162 (a) of the Internal Revenue Code of 1954, 26 U. S. C. 162 (Appendix D).

RULES AND REGULATIONS INVOLVED.

C. F. R., Title 26, I. R. 1954, Income Tax, § 1.161-2 (Appendix D);

C. F. R., Title 26, I. R. 1954, Income Tax, § 1.162-2 (Appendix D);

C. F. R., Title 26, I. R. 1954, Income Tax, § 1.62-1 (e) (Appendix D);

Federal Rules of Civil Procedure, Rule 52 (a), 28 U. S. C. (Appendix D).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

Jurisdiction of the Federal District Court was invoked by the taxpayer to bring suit against the District Director of Internal Revenue for erroneously and illegally assessing and collecting moneys under the claim that they were due as taxes under the Internal Revenue laws of the United States.

QUESTIONS PRESENTED.

1. Are not the reasonable expenses of an employee required by his employer to attend a meeting called and arranged by the employer deductible by the employee as an ordinary and necessary expense paid or incurred in carrying on a trade or business under the Internal Revenue Code of 1954, Section 162 (a), 28 U. S. C. 162 (a)?

2. Where husband's employer treats his wife as a "partner" in his business, interviews her before employment of the husband, makes periodic reports to her and takes positive steps to inform and instruct her in the nature of her husband's business, are not her expenses for attending a meeting called and arranged by the employer for instruction purposes deductible as an "ordinary and necessary" expense under Internal Revenue Code, Section 162 (a)?

3. Is it reasonable for an appellate court to reach a "definite and firm conviction that a mistake has been committed" justifying a reversal of the findings of fact of the District Court sitting without a jury in a case in which there is substantial evidence supporting the findings of the District Court when one of the Judges of the appellate court finds "overpowering compulsion" to agree with the findings of the District Court under Federal Rules of Civil Procedure 52 (a); 28 U. S. C., Rule 52 (a)?

STATEMENT OF THE CASE.

This is a case brought by Petitioners in the Federal District Court for the Northern District of Alabama for the recovery of income taxes illegally and erroneously assessed and collected by the District Director of Internal Revenue for the District in which the Petitioners resided for the calendar year 1956 (R. 12).* Upon trial of the case by the Chief Judge of the Federal District Court sitting without a jury, judgment was entered for the Petitioners (R. 133).

On Respondent's appeal, the Court of Appeals for the Fifth Circuit, with one Judge dissenting, reversed the judgment of the trial court and remanded the case for further proceedings not inconsistent with its opinion (R. 324-353, Appendix B).

The testimony showed that Petitioners (husband and wife) timely filed their joint Federal income tax return for the year 1956 and paid the tax thereon (R. 12-13). The Respondent determined a net tax deficiency of $65.59 (R. 13), which was paid; claim for refund was filed and denied; and Petitioners entered suit (R. 13-14, R. 1). The deficiency was assessed by the Respondent for failure of Petitioners to include in their return as additional income the sum of $284.48, representing the expense of Liberty National Life Insurance Company (sometimes hereinafter referred to as the Company), the employer of J. C. Thomas, incurred by it for the expense of attendance by Petitioners at a meeting of the Torch Club of the Company held at Hotel Chamberlin, Old Point Comfort, Virginia, May 16-20, 1956 (R. 13).

The reasonableness of this expense is admitted (R. 38). Petitioners' home and place of business was Birmingham,

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* Jurisdiction of the District Court in this class of action is set forth in 28 U. S. C. 1346 (a) (1).

Alabama (R. 23). The place of the meeting was approximately 300 miles from Birmingham (R. 31). Petitioners used their own automobile to make the trip (R. 31). The expense of $168.16 was advanced to Petitioners by the Company for transportation, meals and lodging to and from the meeting (R. 99). This was reasonable (R. 38), and was spent for these purposes (R. 17 and 32). The Company paid direct to the Hotel $103.40 for Petitioners' lodging and meals while attending the meeting and in addition, paid $12.92 for other expenses (R. 99). These were reasonable (R. 38).

The Torch Club of the Company is an annual meeting held by it which is the culminating feature of the training program of the Company for its field representatives (R. 92). Similar meetings have been held annually by the Company since 1931 (R. 118). Membership in the Torch Club is by invitation from the Company upon qualification by attaining pre-announced goals (R. 94, 37 and 41). Membership is each year composed of outstanding field representatives of the Company who have attained certain standards, evidenced high abilities, and made outstanding contributions to the Company in their chosen field (R. 95). The Torch Club was established initially to serve in an advisory capacity to management (R. 119). Formal programs and schedules are maintained, having as their purpose to promote the professional knowledge, skill, attitude and morale of those Company representatives in attendance (R. 121, 92 and 93). Attendance of those present upon the scheduled program is required by the Company and Petitioners did so attend (R. 19-31).

The Company requires invited employees to attend (R. 121, 112, 100 and 98). Failure to attend without adequate reason makes nil chances of future promotion (R. 121).

The Company requests the wife of the employee to attend these annual meetings (R. 121). It considers the wife, as well as the husband, an employee, which is mani-

fested by positive efforts on the part of the Company to obtain and maintain loyalty of the wife and to draw her closer to the Company in the interest of the Company's business and in the interest of the business of the husband (R. 112). Before an agent is hired, the Company interviews the wife in her home (R. 86). After the husband is hired, it sends the wife literature on how she can help her husband in the business, and periodically, after employment, sends her further reports (R. 127). Attendance by the wife at Torch Club meetings provides her with information and knowledge of the Company's business and its nature (R. 87-90, 121, 190). It makes her feel closer to the Company and relieves her of any possible resentment toward the Company for taking her husband away from her and her family, assures a higher tone of the meetings, and eliminates occasional misconduct problems that attend such meetings when they are stag affairs (R. 59-60). A good percentage of the men who leave the employment of the Company leave because their wives are dissatisfied (R. 121).

Portions of the programs of such meetings are directed to the wife (R. 121). In the Company's opinion, the key to the husband-employee success is the wife, and the Company employs less than 1% of unmarried men (R. 90).

Meetings of this nature are arranged by the Company and Petitioners had no control over the program at the meeting, nor the time, nor the place for its holding (R. 98-99).

The meeting was held May 16-May 19, 1956. Petitioners arrived at the site at 1:30 P. M. Wednesday, May 16, and registered at the Hotel (R. 18). They cleaned up, changed clothes and then renewed old acquaintances and made new acquaintances among Company employees by mixing with others attending the convention in the lobby of the hotel until 5:00 P. M. (R. 18). They attended the Company

reception at 6:30 P. M., and the Company dinner thereafter (R. 19).

May 17th, they ate breakfast with other Company personnel attending the meeting (R. 20). At 10:00 A. M. they went into a formal meeting (R. 21), which lasted until 12:30 P. M. (R. 22). This being the first formal meeting the usual formalities peculiar to conventions took up some 45 minutes (R. 21). The leading agents and superintendents were publicly presented certificates in recognition of their achievements. The president of the Company made his annual report (R. 21; Defendant's Exhibit "A", R. 271). In the afternoon, J. C. Thomas played golf with one of the officials of the Company and two others (R. 56).

Friday, the 18th, all attending the convention ate breakfast together, were loaded on buses and toured Williamsburg and Jamestown at Company's expense (R. 24). In the words of the Petitioner, he tried to sit next to a more successful man than himself in the hope of learning something for "stuff like that can brush off on you" (R. 49).

Saturday, the 19th, those in attendance ate breakfast together, then attended a formal session of the convention which lasted over $2\frac{1}{2}$ hours in which they heard Walter Smith of the Metropolitan Life speak on the subject "Twelve Successful Years on a Debit", and Kenneth Anderson speak on "Targets of Opportunity" (R. 25, 26 and 27). That afternoon they went on a two hour boat trip around Chesapeake Bay (R. 27). Saturday night they attended the President's banquet at which special awards were handed out. The leading agent and the presidents of various sections of the Torch Club and their wives were introduced and honored (R. 28 and 29).

This meeting did not constitute any part of the agent's vacation (R. 31), though the Company endeavored to so conduct it as to make the agents and their wives desire

to attend (R. 120 and 121). There was a good balance between instruction and recreation (R. 61).

It has been the Company's experience that only 17% of those employees of the Company who attend such meetings terminate their employment, whereas 83% of those employees who terminate their employment never attend such meeting (R. 93 and 94).

It was necessary to hold this meeting in a "resort-convention" hotel (R. 7), since commercial hotels are not equipped or staffed to handle conventions of this size and do not desire this type of business (R. 68-69).

Similar types of meetings are usual and customary among the life insurance companies (Plaintiff's Exhibits 15 and 16, R. 249-270).

After hearing all the evidence, the trial court was left with the "overwhelming impression" that the meeting served a business purpose and that the expenses were deductible by the Petitioners (R. 122-125). Despite the dissenting opinion in which Judge Brown asserted that the "taxpayer proved, as the district court found, overpowering business compulsions and the deductions ought to have been allowed" (R. 352, Appendix B), two judges of the Court of Appeals writing for the majority found a "definite and firm conviction" that a mistake had been made, made a new finding that the meeting was primarily for pleasure and reversed and remanded the case (Appendix B).

Thus, we have a situation where a trial court who heard all the evidence could be left with one "overwhelming impression", where a dissenting judge in the Court of Appeals could find "overpowering business compulsion", and yet where two judges of the Court of Appeals could be left with a "definite and firm conviction" that a mistake had been made and ordered a reversal under Rule 52 (a) of Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT.

I.

Are Not the Reasonable Expenses of an Employee Required by His Employer to Attend a Meeting Called and Arranged by the Employer Deductible by the Employee as an Ordinary and Necessary Expense Paid or Incurred in Carrying on a Trade or Business Under the Internal Revenue Code of 1954, Section 162 (a), 28 U. S. C. 162 (a)?

In holding that such expenses are not deductible, the Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.[1]

The Supreme Court of the United States has painstakingly, in a number of cases, outlined the criteria for determining ordinary and necessary business expense within the meaning of this statute. "Ordinary" has the connotation of normal, usual or customary. It may happen but once in a taxpayer's lifetime if the transaction which gives rise to it is of common or frequent occurrence in the type of business involved. **Deputy v. DuPont,** 308 U. S. 488, 84 L. ed. 416. Custom and practices prevailing in the business world will usually furnish reliable guides whether

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[1] See remarks by Joseph E. Tansill in 14 Journal of Taxation 201, 202.

"Expenses of wives of employees paid by the employer, in attending conventions, . . . seem to constitute another area of spotty enforcement when various parts of the country are contrasted with each other. There are variations among agents in the same district, of course, so that complete uniformity does not exist, but in general it appears that the Middle West has been more vigorous than some other areas on the question of the expense account problems, including wives expenses. *Litigation may ultimately be required to settle these questions*, where the wife's presence is a 'command performance' . . . or where the wife does in fact perform an important function. . . . Modern corporate philosophy regards a key employee's wife as an indispensible member of the team, and many a promising career has been blocked because the individual's wife doesn't measure up" (Emphasis ours).

particular expenses are ordinary in that business. **Welch v. Helvering**, 290 U. S. 111, 54 S. Ct. 8, 48 L. ed. 212.

The three principal tests of deductibility of expenses were clearly stated by this Court in construing § 23 (a) (1) (A) of the Internal Revenue Code of 1939 which is identical in language with § 62 of the Internal Revenue Code of 1954.

In **Commissioner of Internal Revenue v. Flowers**, 326 U. S. 465 at 470, it is held:

> "Three conditions must thus be satisfied before a travel expense deduction may be made under § 23 (a) (1) (A):*
>
> "(1) The expense must be reasonable and necessary travelling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while travelling.
>
> "(2) The expense must be incurred while away from home.
>
> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See **Commissioner of Internal Revenue v. Heininger**, 320 U. S. 467, 475.

That which is common or frequent in the type of business involved reflecting a nationwide practice is "ordinary". **Lilly v. Commissioner of Internal Revenue**, 343

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* Of the 1939 I. R. C.

U. S. 90, 96 L. ed. 769. What is "necessary" is to be determined from the "ways of conduct and the forms of speech prevailing in the business world." **Lilly v. Commissioner of Internal Revenue**, supra. None of these cases involved a pronouncement by the Supreme Court of the United States under so called "convention" or "meeting" cases.

It has been said that whether an expenditure is both "ordinary and necessary" will depend upon whether the "average hard-headed businessman" might have made the expenditure although the payment seems unusual, unique or doubtful to one not having the responsibilities of management. **Wohl v. U. S.** (C. A. 5th), 260 F. 2d 605.

Expenses incurred by a lawyer in attending a tax institute to keep abreast of the "trends, thinking and developments" in his profession have been held to be "ordinary and necessary" even though they do not affect the lawyer's maintaining his position in his profession. **Coughlin v. Commissioner of Internal Revenue**, 203 F. 2d 307.

The expenses of a school teacher attending summer school are ordinary and necessary if they are expended in order to comply with the requirements of the employer. **Hill v. Commissioner of Internal Revenue**, 181 F. 2d 906. So are expenses incurred for refresher courses to acquaint employees with new processes in the industry. **Pacific Grape Products v. Commissioner of Internal Revenue**, 17 T. C. 1097 (reversed on other points, 219 F. 2d 862). Other courts have allowed deductions for such expenses to clergymen attending a church convention, **Shutter**, 2 B. T. A. 23; to an employee attending conventions of a related business group, **Ratterman, et al.**, 7 T. C. M. 476, affirmed without opinion (C. A. 6), 177 F. 2d 204; to a lawyer attending a meeting of the American Bar Association, **Ellis v. Burnet**, 50 F. 2d 343; to a legal secretary attending the convention of the National Secretaries Association, **Rita M. Callinan**, 12 T. C. M. 170; to physicians

attending medical conventions, **Robert Coffey**, 21 B. T. A. 42; to certified public accountants attending conventions, **Charles O. Gunther, Jr.**, 54,287 P H Memo T. C.; to university teachers in attending conventions or scientific meetings, **Alexander Silverman**, 6 B. T. A. 1328; to professional cartoonists in attending political conventions, **Jay N. Darling**, 4 B. T. A. 499; and to persons attending the Red Cross Convention, **Henry Cartan**, 30 T. C. 308.

In this case, Petitioner J. C. Thomas in attending the meeting was pursuing and performing his business as an employee of his employer who demanded his presence at a particular place for the transaction of a program arranged solely by the employer. Such meetings were customary as evidenced by the Company practice of over 25 years, and by the nationwide practice of the industry. The attendance by the employee assured his opportunity for future promotion, gave him professional knowledge and instruction, informed him of the Company practice and plans and were "ordinary and necessary" in the most compelling sense. They were paid or incurred in carrying on his trade or business as an employee so as to fall expressly within the language of the statute [Internal Revenue Code § 162 (a)].

Federal Tax Regulations, evidently foreseeing the difficulties involved in establishing convention expenses as "ordinary and necessary", or of weighing many intangible factors to determine whether such meetings are primarily personal or primarily business, directly address themselves to the exact circumstances involved in this case.

This Regulation, Section 1.162-2 (d) is as follows:

> "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under Section 162 depending upon the facts and circumstances of each case. No distinction will be made

between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefitting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

Pointing out that expenses "paid or incurred by a taxpayer in attending a convention or other meeting" may be deductible, this section of the Regulation observes that "no distinction will be made between self-employed persons and employees"; and further, even, the fact that an employee "uses vacation or leave time or that his attendance is voluntary" will not prohibit the allowance of the deduction.

The allowance of convention expense is not conditioned upon whether it is a convention of the industry as a whole, or of a segment of the industry, or of the employees of one employer.

Petitioners were attending a "convention or other meeting"; they were "employees"; they did not use vacation or leave time; their attendance was, in a great measure, compelled, not voluntary. Thus far, then the criteria are more than met.

Then, the regulation establishes its positive test—there is a "sufficient relationship" between the taxpayer's trade or business and his attendance. "Sufficient" being subject to broad interpretation, the regulation spells out its meaning. It is sufficient if it "is benefiting or advancing the interests of his trade or business".

So, there it is. In plain language it simply says a taxpayer will be allowed to deduct expenses paid or incurred when attending a convention or other meeting when such attendance is benefiting or advancing the interests of his trade or business.

At this meeting taxpayer received professional instruction in his particular trade; he received information about his employer; and he was assuring his being considered for promotion or advancement (R. 99) in his business as an employee of his employer; and he was complying with his employer's requirement.

Finally, the test is negatively stated. The expenses are not deductible if the meeting is for "political, social or other purposes unrelated to the taxpayer's trade or business. . . ."

Certainly the meeting was not for political purposes. It was not for social or other purposes unrelated to Petitioner's business.

So, to paraphrase the Regulation, Petitioners, as employees, attended a meeting not on vacation or leave time, having a sufficient "relationship" to their business so that they were advancing the interests of their trade or business by such attendance. Truly, there was literal compliance with the Regulation, and the expenses "paid or incurred" by them are deductible.

Such literal compliance both with the statute and with the Regulations should not be thwarted by the decisions of the court, and this Court should settle this question.

The disallowance of the deductibility is contrary to the express Federal tax regulations covering attendance at such meetings. The court's remand to allow a prorata deduction for Petitioner-husband's expenses while attending business meetings is contrary to the express provision of the statute, I. R. C., § 162 (a) (2) that traveling expenses includes the entire amount expended for meals and

lodging . . . while away from home in the pursuit of a trade or business." The statute says "the entire amount expended for meals and lodging" may be deducted. The appellate court sought to prorate such expenses.

If taxpayer was expected by his employer to attend the meeting and would suffer by not attending, his presence was important for two reasons. First, he would receive benefits of this contact and instruction. Second, he would secure his job and economic future. In attending taxpayer was in complete pursuit of his trade or business.

This is a question of Federal tax law important to the entire business community which should be settled by this Court.

II.

Where Husband's Employer Treats His Wife as a "Partner" in His Business, Interviews Her Before Employment of the Husband, Makes Periodic Reports to Her and Takes Positive Steps to Inform and Instruct Her in the Nature of Her Husband's Business, Are Not Her Expenses for Attending a Meeting Called and Arranged by the Employer for Instruction Purposes Deductible as an "Ordinary and Necessary" Expense Under Internal Revenue Code § 162 (a)?

Again, we are presented with an important question of Federal law which has not been, but should be, settled by this Court.[2]

Federal Tax Regulations (Section 1.162 (c)) have recognized such expenses to be deductible as an "ordinary and necessary" business expense in carrying on a trade or business under I. R. C., § 162 (a), when the wife accompanies her husband on a business trip. In doing so, a test

[2] Joseph E. Tansill, 14 Journal of Taxation, 201 at 202, supra note (1). Article by Dr. William C. Menninger entitled "Let's Take Wives to Conventions", published in January 11, 1959 edition of This Week Magazine.

has been engrafted. It must be "adequately shown that the wife's presence on the trip has a bona fide business purpose."

What constitutes a "bona fide business purpose" has not been determined by this Court. Going with a husband on a honeymoon trip to Europe does not meet such test, although the husband may transact business while there. **Silverman v. Commissioner of Internal Revenue,** 253 F. 2d 849 (C. A. 8). The wife's expenses have not been allowed where no pretense was made that her presence served any business purpose. **Moorman v. Commissioner of Internal Revenue,** 26 T. C. 666; **Duncan v. Commissioner of Internal Revenue,** 30 T. C. 386; **Faitoute Iron and Steel Co. v. Commissioner of Internal Revenue,** 11 B. T. A. 818; **Hamlin's Estate v. Commissioner of Internal Revenue,** 9 T. C. M. 447.

Such purpose has been found where the wife of a concert singer accompanied her husband on tour, was a paid employee of the husband, and coached him in his roles. **Thomas v. Commissioner of Internal Revenue** (1939 P-H B. T. A. Memorandum Decisions, Par. 39,112). It has also been found where the wife acted as secretary and entertained prospective customers on a selling trip taken by her husband. **Walkup Drayage & Warehouse Co. v. Commissioner of Internal Revenue,** decided June 25, 1945 (1945 P-H T. C. Memorandum Decision, Par. 45,241).

The instant case presents a situation in which the husband's employer treats the wife as part of the business. Interviews her in the home before his employment (R. 86); welcomes her as a "partner" upon husband's employment (R. 87); send her literature and instructions on how she can assist her husband in his work (R. 88); and continues periodic reports to her on her husband's progress in the business (R. 89). It presents a case where very positive and untiring efforts are made by husband's employer to obtain and maintain loyalty and assistance to

the Company for many business reasons: to actively assist husband (R. 59); to help keep him satisfied in his work (R. 212); where the Company hires less than 1% of unmarried men (R. 90); where the wife is recognized with her husband for his achievements (R. 100); where she is requested and expected by the Company to attend the meeting (R. 98, 121); where she attends the scheduled program which is directed to her as well as the husband (R. 116). Surely such absorption into the business of the husband makes the attendance of the wife that of serving a "bona fide business purpose", and this Court should so determine and settle this important question.

III.

Is It Reasonable for an Appellate Court to Reach a "Definite and Firm Conviction That a Mistake Has Been Committed" Justifying a Reversal of the Findings of Fact of the District Court Sitting Without a Jury in a Case in Which There Is Substantial Evidence Supporting the Findings of the District Court When One of the Judges of the Appellate Court Finds "Overpowering Compulsion" to Agree With the Findings of the District Court Under Federal Rules of Civil Procedure 52 (a), 28 U. S. C., Rule 52 (a)?

A "definite and firm conviction that a mistake has been committed" provides the requisite basis for the setting aside by the appellate court of findings of fact of a trial court under Rule 52 (a), Federal Rules of Civil Procedure. **United States v. United States Gypsum Co.**, 333 U. S. 364, 365, 68 S. Ct. 525, 542.

The caution with which such authority should be used is indicated, however, in **Commissioner of Internal Revenue v. Duberstein**, 363 U. S. 278, 291, where this Court reversed an appellate court for overturning findings which were "warranted" by the trier of the facts.

Such action by the Court of Appeals in the instant case seems as inappropriate as in the **Duberstein** case, for here we are also dealing with "ordinary and necessary" business expenses which this Court characterized in **Welch v. Helvering**, 290 U. S. 111, as having no ready touchstone: "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."

Rule 52 becomes meaningless if with importunity an appellate court may overturn the decision of the trier of facts. There must be some reasonable basis for such "conviction". There must be something more than what the appellate court in the first instance might have concluded if it had been the trier of the facts. **United States v. National Association of Real Estate Boards**, 339 U. S. 485, 70 S. Ct. 711; **United States v. Yellow Cab Co.**, 338 U. S. 338, 70 S. Ct. 177.

Before a finding is "clearly erroneous" should it not be so in fact before a subjective "conviction" is permitted to be asserted for the fulfillment of its definition? Then, where two reasonable findings may be made, is it "clearly erroneous" that one finding was made by the court who heard the testimony whereas the appellate court might have made the other finding?

To state this case specifically, the trial court with many years of experience heard all the evidence in the case and was left with an "overwhelming impression" (R. 122) that led it to enter judgment for Petitioners. One of the three Judges of the Court of Appeals was of the opinion that, "the taxpayer proved, as the District Court found, overpowering business compulsion and the deductions ought to have been allowed."

With deference, it is submitted that this action of the Court of Appeals in reversing and remanding this case departs from the accepted, usual and statutory course

of judicial proceedings, and calls for the exercise of the supervisory authority of the Supreme Court of the United States.

CONCLUSIONS.

1. The Court of Appeals for the Fifth Circuit erred in holding that the expenses reasonably incurred by the Petitioner husband in attending the business convention called the Torch Club, in 1956, are not deductible as an ordinary and necessary expense paid or incurred in carrying on a trade or business under Sec. 162 (a) of the Internal Revenue Code of 1954.

2. The Court of Appeals for the Fifth Circuit erred in holding that the expenses of the wife reasonably incurred in attending said Torch Club Convention with her husband, are not deductible by the Petitioners as ordinary and necessary business expenses under Sec. 162 (a) of the Internal Revenue Code of 1954.

3. The Court of Appeals for the Fifth Circuit erred in holding that "The findings of the Trial Court to the effect that the payments in this case were not properly includible within taxpayer's gross income, and that if so includible, they were deductible as ordinary and necessary business expenditures, are mistaken and thus clearly erroneous within the meaning of Rule 52 (a), F. R. C. P."

4. The Court of Appeals for the Fifth Circuit erred in holding that "deductions claimed by the taxpayer's wife will be denied in toto, since her presence at the business meetings which taxpayer attended had no bona fide business purpose from the viewpoint of the taxpayer."

5. The Court of Appeals erred in holding that the trial court, which saw the witnesses and heard the evidence without a jury, is mistaken in finding that the payments in this case were deductible as ordinary and necessary business expenditures and thus clearly erroneous within the meaning of Rule 52 (a), F. R. C. P.

For the reasons set out above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Frank P. Samford, Jr.
FRANK P. SAMFORD, JR.,

John W. Gillon
JOHN W. GILLON,

Ira L. Burleson
IRA L. BURLESON,
Attorneys for Petitioners.

Affidavit of Service.

State of Alabama,)
Jefferson County.)

I, John W. Gillon, of counsel for the Petitioners herein, and an attorney of record for the Petitioners in the Court below, depose that on the 22 day of May, 1961, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent by delivering said copies hereof to W. L. Longshore, United States Attorney at the Federal Building, Birmingham, Alabama.

John W. Gillon
John W. Gillon.

Subscribed and sworn before me at Birmingham, Jefferson County, Alabama, on this 22 day of May, 1961.

Joyce E. Spearman
Notary Public.

APPENDIX.

APPENDIX A.

In the United States District Court for the Southern Division of the Northern District of Alabama.

J. C. Thomas and Martha Thomas, Plaintiffs,
v.
George D. Patterson, District Director of Internal Revenue, Defendant.
} Civil Action No. 9098.

(Filed in Clerk's Office, Northern District of Alabama, Nov. 2, 1959.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

This cause coming on to be heard was tried by the Court without a Jury. After a full and fair consideration of the evidence adduced by the parties and the written trial briefs of counsel, the Court now proceeds to make and enter the following findings of fact, conclusions of law and judgment:

Findings of Fact.

1. The Plaintiffs are husband and wife. On or about February 14, 1957, they filed their joint Federal Income Tax Return for the calendar year 1956 and paid the tax thereon. After audit, the District Director of Internal Revenue determined a net tax deficiency for the year 1956 of $65.59. The deficiency was asserted for failure of the Plaintiffs to include as additional income the sum of $284.48 representing the expense of J. C. Thomas' employer, Liberty National Life Insurance Company (some-

times hereinafter referred to as the Company) incurred by it for the expense of attendance by taxpayers at a meeting of the Torch Club of the Company held at Hotel Chamberlin, Fort Monroe, Virginia, from May 16th to May 20th, 1956. After exhausting administrative procedures provided by law, taxpayers did, on April 18, 1958, pay to the Defendant the asserted deficiency with interest thereon totaling $66.35. On May 16, 1958, Plaintiffs filed with the Defendant their Claim for Refund of such sum alleged to have been erroneously assessed and collected. The Claim for Refund was denied by the Defendant by registered mail on May 22, 1958. Thereupon, on June 2, 1958, Plaintiffs filed this action.

2. Plaintiff, J. C. Thomas, was employed by the Company in 1955 and 1956 as a field representative working in one of its district offices in Birmingham.

3. To attend this meeting, Plaintiffs departed from Birmingham on May 14, 1956, spent two nights en route at a place of public lodging, and arrived at Hotel Chamberlin on May 16th. They departed from the Hotel Chamberlin on May 20th, and spent one night at a public lodging en route to Birmingham and reached home on May 21st. Plaintiffs used their own automobile bearing all the expenses therefor. Prior to the departure of Plaintiffs from Birmingham, J. C. Thomas received from his employer a check for $168.16 to be used for expense of transportation, meals and lodging to and from the meeting place. All of this sum was expended by Plaintiffs for these purposes.

4. The Company paid direct to the hotel $103.40 for the Plaintiffs' lodging and meals at the hotel while attending the meeting. The Company also paid direct to a travel agency the sum of $12.92 representing the expenses of a sight-seeing trip to Williamsburg, Virginia. These expenses totaled $284.48, the asserted deficiency in income which produced the asserted tax deficiency of $65.59.

5. Annual conventions of the Torch Club of the Company are the culminating features of the training program of the agency department of the Company for its field representatives. The Torch Club originated in 1931 and is composed each year of outstanding field representatives of the Company who have, during the preceding year, attained certain standards, evidenced high abilities, and made outstanding contributions to the Company in their chosen field. Membership in the Torch Club is attained by invitation from the Company upon qualification by attaining pre-announced goals. It is the Company's experience that those representatives who attain the pre-announced goals are more apt for the type of instruction received at such meetings and for positions of leadership in the Company.

6. The Company requires those employees, agents, supervisors, superintendents, home office officials who are invited and their spouses to attend the annual meetings of the Torch Club. This requirement is not a condition of continued employment, but failure to attend without adequate reason is frowned upon and adversely affects his future promotion. So that the selection of those to attend may be objective and afford equal opportunity to all field representatives, as well as to properly provide an incentive and motivation for attendance, the Company establishes general qualifications every year. These qualifications vary from year to year, but production of life insurance sales is always an important criterion.

7. The evidence is undisputed that the purpose of such meetings of the Torch Club and the nature of the programs promotes the professional knowledge, skill, attitude and morale of agents and their wives in attendance and this under pleasant surroundings. Attendance of those present upon the scheduled program is required and Plaintiffs did so attend. The tours and planned recreation providing enter-

tainment for those in attendance could not and did not detract from the genuine business character and purpose of the meeting.

8. The presence of the Plaintiff wife at the meeting served a bona fide business purpose. This business purpose is manifested by the employment practices of the Company showing the great importance the Company places upon the wife of the agent, the interview with the prospective agent's wife before employment, the literature sent to the agent's wife instructing her on how she can help her husband to become more successful in the business, and the periodic reports sent by the Company to the wife after employment. The bona fide business purpose is further manifested by the philosophy of the Company as related by its President that the wife, as well as the husband, is considered an employee; by the positive efforts of the Company to obtain and maintain the loyalty of the wife and to draw her closer to the Company in the interest of the Company's business and in the interest of the business of the husband; and by the fact that attendance by the wife at the meetings provides her with information and knowledge of the Company's business and its nature. It makes her feel closer to the Company, relieves her of any possible feeling of resentment toward the Company for taking the husband away from her and the family, assures a higher tone of the meeting, and eliminates occasional misconduct problems that attend such meetings when they are stag affairs.

9. Employees who qualified for an invitation, and were invited to attend, and who failed to attend for any reason, could not and did not receive any money or other thing of value from the Company.

10. The field representatives of the Company, including Plaintiff, J. C. Thomas, had no control over the program, nor the time and place for holding the meeting.

11. Annual meetings of a similar nature are of common and frequent occurrence and traditional in the life insurance industry generally and with the Company.

12. The parties stipulated that the total expenses of $284.48 was reasonable.

Conclusions of Law.

1. The Court has jurisdiction of the subject matter and of the parties.

2. The jurisdictional requisites have been complied with by the Plaintiffs.

3. The $168.16 advanced by J. C. Thomas' employer to him for reimbursement of the traveling expenses of the taxpayers did constitute gross income to the taxpayers, but the total amount of such sum was deductible under the provisions of 26 U. S. C. A. 62 (2) and 26 U. S. C. A. 162; or, in the alternative, said sum did not constitute gross income to the Plaintiffs.

4. The hotel bill of $103.40 paid direct by taxpayer's employer to the hotel and the sum of $12.92 paid direct to the travel agency by taxpayer's employer did not constitute income to taxpayer; or, in the alternative, if such sums did constitute income to taxpayer they were deductible expenses within the meaning of 26 U. S. C. A. 62 (2) and 26 U. S. C. A. 162.

5. There is no evidence in the record to sustain the contention of the Defendant that any part or all of the $284.48 constituted a bonus or a reward to the taxpayer, J. C. Thomas.

6. The attendance by taxpayer, Martha Thomas, at the meeting served a bona fide business purpose.

Judgment.

It Is Ordered, Adjudged and Decreed by the Court that Plaintiffs have and recover of the Defendant the sum of $66.35 with interest at 6% from April 18, 1958, together with the cost of Court in this behalf expended, as provided by law for overassessment by the Defendant and payment by the Plaintiffs to the Defendant of income tax for the calendar year 1956.

Done at Birmingham, Alabama, this 30th day of October, 1959.

Seybourn H. Lynne,
Chief Judge.

APPENDIX B.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 18,263.

George D. Patterson, District Director of Internal Revenue,
Appellant,
versus
J. C. Thomas and Martha Thomas,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(March 16, 1961.)

Before Rives, Brown and Wisdom, Circuit Judges.

Rives, Circuit Judge: The District Director appeals from a determination by the district court[1] that amounts paid by the taxpayer's employer to a hotel and a travel agency for accommodations, meals, and a sightseeing trip for the taxpayer and his wife did not constitute gross income to the taxpayer; or, if they did, then such amounts, together with expenditures for which the taxpayer was reimbursed by his employer, were de-

[1] The findings of fact and conclusions of law of the district court are not officially reported.

ductible by the taxpayer as ordinary and necessary business expenses.

The taxpayer, J. C. Thomas, was employed during the relevant period as a field representative of the Liberty National Life Insurance Company. By meeting certain standards, the taxpayer qualified to attend and bring his wife to the Company's annual Torch Club convention,[2] which in 1956 was held at the Hotel Chamberlin, Old Point Comfort, Fort Monroe, Virginia.

To attend this meeting, the taxpayer and his wife departed from Birmingham on May 14, 1956, spent two nights en route at a place of public lodging, and arrived at the Hotel Chamberlin on May 16. Their return trip commenced on May 20. They spent one night at a public lodging en route to Birmingham, and reached home on May 21. The taxpayer and his wife traveled in their own automobile. Prior to his departure from Birmingham, the taxpayer received from his employer a check for $168.16, which was spent for transportation, meals and lodging to and from the Hotel Chamberlin.

The Company paid directly to the Hotel Chamberlin $103.40 for lodging and meals for the taxpayer and his wife at the hotel while attending the meeting. The Company also paid directly to a travel agency the sum of $12.92, representing the expenses of a sight-seeing trip to Williamsburg, Virginia, for the taxpayer and his wife. The aggregate expenses totaled $284.48. There is no question in this case as to the reasonableness of the amount of these expenses.

The Torch Club originated in 1931 and was composed each year of outstanding field representatives of the Company who had during the preceding year met certain

[2] The requirements for membership in the Torch Club are "based upon sales of new business and the conservation of old business."

established goals. The Company "required" those employees who were invited, and their wives, to attend the annual meeting of the Torch Club. Employees who qualified for the convention, but who failed to attend for any reason, did not receive any money or other thing of value from the Company in lieu of such attendance.

Those present at the Torch Club convention were expected to adhere to the scheduled program. The taxpayer and his wife participated in substantially all of the scheduled activities.[3] The taxpayer had no control over the program, the time, or the place of the meeting.

The schedule of activities at the Torch Club convention was as follows:

Wednesday, May 16:

1:30 Arrival.

1:30-5:00 "Renewing old acquaintances and making new acquaintances."

6:30 Company dinner and water show.

Thursday, May 17:

7:00-9:30 Breakfast with delegates.

10:00 Meeting (2½ hours).

Afternoon—No planned activity (Taxpayer played golf).

8:30 Movie.

Friday, May 18:

7:00-8:30 Breakfast with delegates.

9:00 Tour of Williamsburg and Jamestown.

8:30 Bingo.

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[3] Taxpayer and his wife did not go to the motion picture scheduled for the evening of Thursday, May 17, as they had previously seen it. Nor did they stay "the whole time" at the water show held on Wednesday evening.

Saturday, May 19:

7:00-9:30 Breakfast with delegates.

10:00 Meeting (2½ hours).

Afternoon Boat Trip.

7:00 President's Banquet and Ball.

The appellants' position is that this trip to the Hotel Chamberlin constituted the prize in what, in substance, was an annual sales contest.[4] The taxpayer seeks escape from this determination along two routes.

Initially, the taxpayer argues that his employer's payments to him and to the Hotel and travel agency for his benefit did not constitute gross income to him. For purposes of determining whether these sums were income, we may treat the amounts paid directly to the Hotel and travel agency and the traveling expenses for which the taxpayer was reimbursed in the same manner. In both situations the taxpayer ultimately received only non-cash goods or services, paid for by his employer. Taxpayer claims these sums come within the rule of **Corliss v. Bowers**, 281 U. S. 376 (1930), and are not income to him since he had no "command" over them and was not free to expend them in any manner he saw fit. It has been established beyond question, however, that receipt by a taxpayer of benefits in a form other than cash may constitute income to him.[5] Appellee next argues that the

[4] In his welcoming speech, the President of Liberty National noted that the Company "officially abandoned all company-wide contests a few years ago." He went on to add that, "The only company-wide contest we have left, if it can be called a contest, is the Torch Club, and I do not classify that as a contest, for no one is forced to make it and no one is criticized if he fails to do so."

Gross income includes amounts received as prizes and awards. Section 71, Internal Revenue Code of 1954.

[5] See Section 61, Internal Revenue Code of 1954; Treasury Regulations §§ 1.61-2 (d) (1), 2 (d) (3). See also Commissioner v. Glenshaw Glass Co., 1955, 348 U. S. 426, 432; Commissioner v. LoBue, 1956, 351 U. S. 243, 246.

$168.16 advanced to him for traveling expenses and the sums paid directly to the Hotel and travel agency did not constitute gross income to him because they were expended for the "convenience of his employer." Taxpayer cites, in support of this theory, Regulation 111, Section 29.22 (a) (3) of the 1939 Code, which reads, in part, as follows:

> "If . . . living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be added to the compensation otherwise received."

It is clear from the words of the regulation itself and the cases relied on by appellee[6] that the "convenience of the employer" rule there referred to applies only to meals and lodging and does not exclude amounts paid to the taxpayer which he expended for gasoline, sightseeing trips, etc. from the Code's broad definition of income. The fatal blow to taxpayer's position, however, is delivered by Section 119 of the 1954 Code, which enacts the "convenience of the employer" rule into law, but in a modified form. Under that Section, meals and lodging furnished by employers to employees are excluded from the gross income of the employees "only if

> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

This Section is inapplicable to the sums in issue which were spent for meals and lodging en route to and at the Hotel Chamberlin.

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[6] E. g. Duane ad v. Starr, 2d Cir., 1933, 221 F. 2d 204 (reviewing history of the "convenience of the employer" rules); Boykin v. Commissioner, 8th Cir., 1958, 260 F. 2d 249.

Since the payments received by the taxpayer and his wife from his employer and the noncash goods and services received by the taxpayer and his wife as a result of payments by his employer were includible in the taxpayer's gross income, we must decide whether these amounts were deductible by the taxpayer as ordinary and necessary business expenses within the meaning of Section 162 of the Internal Revenue Code of 1954.

Treasury Regulations 1.162-2 (I. R. C. 1954) provide in part:

> "(b) (1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

Both parties agree that the crucial determination is whether the primary purpose of the trip was business or pleasure.

At the outset, it is important to note that the nature of the trip must be determined from the individual taxpayer's point of view, rather than from the viewpoint of his employer. To illustrate, an employer may find that the efficiency of his salesmen is greatly increased if he gives them a two-week, all-expense-paid vacation trip to Florida as a reward for increasing sales. From the employer's point of view, the amounts he expends in

providing the trip may be business expenses deductible by him.[7] But to the recipient, that trip is solely for pleasure. Although "connected with" his business, the salesman who goes on the Florida jaunt is receiving income, just as if the prize in the sales contest were a bonus, and the amounts expended in going to Florida and spending the two weeks there would be nondeductible personal expenditures. We note, therefore, that the deductibility of sums as business expenses by an employer is immaterial in determining whether the expenditure of those sums by their recipient is deductible by him as an ordinary or necessary business expense.

In determining whether the taxpayer's trip here under consideration was primarily for business or primarily for pleasure, we consider the following:

1. "**The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business . . .**"[8] The schedule of activities at Old Point Comfort reveals that, at the most, five hours out of the three and one-half days were spent in formal business meetings. The first of the two meetings consisted mainly of welcoming speeches, and a review by the President of the past year's activity of the Company, the latter being subsequently reprinted for general distribution. At the second meeting, two speakers did talk on subjects of an educational nature. But more time was spent on the sight-seeing tour alone than at both of these "business" meetings. In answer to this point, the taxpayer forcefully argues that, al-

[7] Expenses of this type would apparently not be deductible by a life insurance company. Section 803, I. R. C. of 1954.

[8] Treasury Regulations 1.162-2 (b) (2).

though the schedule reveals much activity of a purely recreational nature, he sought as co-participants in those activities company officials and better salesmen than himself, who might, while "playing," provide him with information on improving his abilities. He testified that much of the conversation on the sight-seeing tour, the boat trip, and his golf game directly concerned his business. Were these the only facts on which the court had to base its judgment, the proper resolution of the issues in this case would be more difficult than we believe they are. We do think, however, that the low proportion of time spent in formal business meetings distinguishes cases such as **Coughlin v. Commissioner**, 2d Cir., 1953, 203 F. 2d 307, where the taxpayer, an attorney, was allowed to deduct the expenses of tuition, travel, board and lodging incurred in attending a federal tax institute at New York University.

2. **The convention was sponsored by the taxpayer's employer and its only participants were taxpayer's co-employees.** Taxpayer seeks to rely on cases such as **Alexander Silverman**, 6 B. T. A. 1328 (1927), which allowed a university professor to deduct the expenses of attending a scientific convention. In none of those cases, however, was the convention sponsored solely by the taxpayer's employer. This fact, we think, is some, though not conclusive, evidence that the convention was really a form of remuneration.

3. **The convention was held at a resort hotel.** The taxpayer argues that the number of people attending the convention was large, and that a location had to be found where all the conventioneers could be housed together. Although the evidence is by no means conclusive on the point, it may well be that no hotel located closer to the homes of the convention participants was capable

of handling a group of that size.[9] But, the fact remains, the convention was at a resort hotel.[10]

4. **The attitude of the Company.** The Company looked on the trip as one primarily devoted to pleasure and sought to convey this impression to the participants. In making arrangements for the trip, a vice-president of the Company wrote to the Manager of the Hotel Chamberlin, that: "While we hold two business meetings during our four-day convention, business is secondary. The main object is to give our people a good time. Specifically, I would be interested in knowing the fishing accommodations." The next paragraph of that letter reads:

> "One thing that interests us about Old Point Comfort is the proximity to Williamsburg and other famous historical places. I would like to get some information relative to sight-seeing trips for the entire group. Another question I would like to clear up is relative to the weather during the month of May. Is it warm enough for outdoor activities or not?"

The vice-president's wife sent a letter to the wives of qualifying employees, in which she noted that:

> "The Virginia Peninsula has everything to offer for a vacation convention. It is the sightseer's paradise. One whole day of the Convention will be devoted to a tour of Jamestown and Williamsburg, with

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[9] But see, Rudolph v. United States, Civil No. 8317, N. D. Texas, 1960.

In his welcoming speech, the President of Liberty National noted that: "This is an unusual meeting since it is being held here in Virginia, a state in which we do not operate . . . but it was felt that everyone would enjoy a trip to this historic part of the country."

[10] Among the facilities available to the conventioneers were: shuffleboard; horseshoes; ping-pong; billiards; pool; a heated, outdoor, salt water swimming pool; a picnic area; and a television theater. In addition, the hotel was situated in "the center of historic Virginia" with numerous spots for sight-seeing enthusiasts.

a stop at the battlefield at Yorktown, where the surrender of Cornwallis to George Washington ended the Revolutionary War. There is so much to be seen!"

The letter concluded: "I hope you will have as much fun as we have had in planning this vacation for you." With reference to the employees, there was testimony that, "they consider it a reward. I hope they do. We have been trying to sell them on it for a long time."

We think that the foregoing factors establish that the primary purpose of the trip to the Hotel Chamberlin was pleasure.

Whether an expenditure is ordinary and necessary to a taxpayer's trade or business is usually a question of fact.[11] And "Where the trial has been by a judge, without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed. Rules Civ. Proc., 52 (a). 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' **United States v. United States Gypsum Co.**, 1948, 333 U. S. 364, 395."[12]

We are convinced that the findings of the trial court, to the effect that the payments in this case were not properly includible within the taxpayer's gross income, and that if so includible, they were deductible as ordinary and necessary business expenditures, are mistaken and thus clearly erroneous within the meaning of Rule 52 (a), F. R. C. P.

The taxpayer will be allowed a pro rata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses.[13]

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[11] Commissioner v. Heininger, 1943, 320 U. S. 467.

[12] Commissioner v. Duberstein, 1960, 363 U. S. 278, 291.

[13] Treasury Regulations 1.162-2 (b) (1), quoted supra.

It follows, as a matter of course, that deductions claimed by the taxpayer's wife will be denied *in toto*, since her presence at the business meetings which taxpayer attended had no bona fide business purpose from the viewpoint of the taxpayer.[14]

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Brown, Circuit Judge, Dissenting:

I certainly concur that the amounts involved constituted income to the Taxpayers. The question is whether the amounts spent were "ordinary and necessary expenses paid * * * in carrying on any trade or business," 162 (a), or ordinary and necessary "traveling expenses * * * while away from home in the pursuit of a trade or business," 162 (a) (2).[15]

I am also in agreement that we are here concerned with Mr. and Mrs. Thomas as the Taxpayers. We must therefore view it from their standpoint. Deductibility to either of them is distinct from the deductibility to "their" employer, Liberty National Life Insurance Company. I would not, however, go so far, as does the Court, to say that the deductibility status to the employer corporation of the payments made by it * * * is immaterial in de-

[14] Treasury Regulations 1.162-2 (c).

[15] 26 USCA § 162 (a): "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including

"(1) * * *

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

terminating whether the expenditure of these sums by their recipient is deductible by him * * *." For reasons which I undertake to develop the considerations making expenditures "ordinary and necessary" to the employer may be part and parcel of a business situation making the spending of such sums equally ordinary and necessary as to the recipient employee. In other words, the one is a factor influencing the other.

But I differ fundamentally as to the denial of full deduction to the husband for all of his expenses. The position of Mrs. Thomas is not so clear, but as to her also I think the expenses were deductible without proration.

I say fundamentally because deductibility depends on the statute, and not on what this or that particular court decision happened to hold. Consequently, I would not urge that our decision here is contrary to the cases pressed by Taxpayers.[16] These are but two isolated opinions in what has been described by one Court as a "formidable array of authorities."[17] A leading text more accurately calls it "a plethora of authorities"[18] especially in view of the aptness of the medical connotation that this is "a morbid condition characterized by an excess of blood in the body" of the law.

A constant recurrence to the words of the statute "ordinary and necessary" in the light of general principles distilled from this mass of material will, in my judgment, put quite a different turn on the activities of these Tax-

[16] Coughlin v. Commissioner, 2 Cir., 1953, 203 F. 2d 307; Alexander Silverman (1927), 6 B. T. A. 1328, discussed by the Court . . F. 2d . . . .

[17] V. Giurlani & Brother v. Commissioner, 9 Cir., 1941, 119 F. 2d 852, 855.

[18] 4 Merten's, Law of Federal Income Taxation, § 25.01 at 5. Under 130 subheadings covering 300 pages of text, thousands of cases are listed in hundreds of footnotes.

payers. A brief resume shows, I think, two things: First, the Court disregards these factors; and second, it operates as a fact-finder to reach factual inferences contrary to those of the District Judge who saw and heard all of these witnesses.

To begin with the standard of "ordinary and necessary" concerns whom? The test is not what the Commissioner thinks ought to be necessary or ordinary, or what a court, or its judges, might consider proper. Fortunately for our economy, none of these has the responsibility for running the particular business—personal or corporate—whose income is so essential as a subject of taxation. The test is in terms of the specific taxpayer. It seeks to measure whether, as to him, the questioned expenditures are substantially related to his business venture whose object is making money.

We encounter no difficulty in this record in relating Taxpayer's usual activity to a "trade or business." As to this element Taxpayer's employment fits the simple test that "Every person who works for compensation is engaged in the business of earning his pay * * *."[19] And it is without dispute that as a field representative of this insurance company he had long conducted "the enterprise in good faith with an intention of making a profit * * *" and "of producing income"[20] for himself. Whether the expenditures in question are deductible turns on whether they were "ordinary and necessary." As to these statutory words "it has been said that" these "mean those expenses which economically are an integral part of a business * * *."[21] An expenditure "will ordinarily be con-

[19] Id., § 25.08 at 20.

[20] Id., § 25.08 at 21.

[21] Id., § 25.09 at 24, citing Commissioner v. Doyle, 7 Cir., 1956, 231 F. 2d 635, 637, that "integrality is the test."

sidered 'necessary' if the expenditure is appropriate and helpful in developing and maintaining the taxpayer's business * * *."[22] Quite obviously, "the necessity involved is not absolute or inexorable."[23] Proceeding on the assumption that "a taxpayer will not incur an expenditure unless required or justified by the needs of the business," the "courts are slow to override the taxpayer's judgment as to the necessity for incurring the expenditure."[24]

This brings us to the companion term "ordinary" since the expenditure must be both necessary and ordinary. As we are dealing with an "ordinary" expense in the business community "Customs and practices * * * and forms of speech prevailing in the business world of the taxpayer will usually furnish reliable guides * * *."[25] One thing is clear, the "concept of 'ordinary' * * * does not require that the expenditures be either habitual or normal in the sense that the taxpayer either makes or is required to make them often; the expenditure may be 'ordinary' even though unique or nonrecurring to the taxpayer affected."[26] Quite obviously, "the nature and scope of the taxpayer's business constitutes a factor of considerable importance."[27] For it "to be 'ordinary and necessary', the expenditure must have some reasonably proximate relation to the customary conduct of the taxpayer's busi-

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[22] 4 Merten's, § 25.09 at 24.

[23] Id., § 25.09 at 24-25.

[24] Id., § 25.09 at 25.

[25] Id., § 25.09 at 26.

[26] Id., § 25.09 at 27 and note 76.2: "An expense may be ordinary though it happen but once in the taxpayer's lifetime. Deputy v. DuPont, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363 (1940); Campbell v. Fields, 229 F. 2d 197 (C. A. 5th, 1956)."

[27] 4 Merten's, § 25.09 at 29.

ness."[28] After pointing out that the decisive distinctions are those of degree and not of kind for which there is no "verbal formula that will supply a ready touchstone" the Supreme Court has made a remarkable pronouncement. It is remarkable because it takes into account in vivid fashion that the statutory term "ordinary and necessary" is to be judged against the habits and customs of American businessmen whether those on the sidelines would consider them prudent or imprudent, wise or unwise. The Court states the statutory standard:

> "* * * is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."[29]

An eminent text sums it up this way.

> "All of the foregoing criteria and principles may be said to rest, at least in part, on an underlying implication. That implication is that whether an expenditure is both 'ordinary and necessary' will depend upon a determination as to whether a hard-headed businessman would have incurred it under like circumstances. That person is the so-called average hard-headed businessman and not necessarily the taxpayer himself. * * *"[30]

How do the facts of these expenditures[31] and Mr. Thomas' business life match these principles? At the

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[28] Id., § 29.00 at 31.

[29] Welch v. Helvering, 1933, 290 U. S. 111, 115, 54 S. Ct. 8, 9, 78 L. Ed. 212, 213; id., § 25.00 at 28.

[30] 4 Mertens, § 25.00 at 34. This Court has approved this approach. Rittenberg v. United States, 5 Cir., 1959, 267 F. 2d 605, 608.

[31] The amounts paid directly by the employer and those reimbursed to Thomas by the Company's advance are all attributed as income. Consequently, the questions in issue are the same as though the amounts were paid out of his pocket with no right of reimbursement.

beginning is the bald fact that he had nothing to do with picking out Old Point Comfort, Fort Monroe, Virginia. One on a personal jaunt which is to be treated as a vacation normally has something to do with the selection of the place and the time. More than that, whether to go or not to go was not a matter of choice with him. He was not a free agent—unless, to play on words, he declined to go in which case he would indeed be a free agent—free of a job and free of Liberty National.

This convention had some of the earmarks of a prize. But it was more than that. It was a command appearance. Its importance is not for us to judge. That judgment was made by the employer, Liberty National. Those "invited" to the Torch Club were outstanding field representatives who had during the preceding year attained certain standards, evidenced high abilities, and made outstanding contributions to the Company. How much real freedom did one invited have to decline the bid? None at all, were he interested in his future employment or advancement.

The president of Liberty National so testified without contradiction:

> "Q. Does the company require those who qualify and are extended an invitation to attend these [Torch Club] conventions?
>
> "A. Well, we don't issue an order but in effect it is a requirement. They know good and well enough if they do not attend their chances of promotion is just nil.
>
> "Q. Does the company expect the wives of the agents to attend?
>
> "A. Yes sir."

How may this Court disregard the positive testimony that employees were required to attend? Certainly we

may not do it on any inherent credibility flaws of the witness or his words. The District Judge credited this testimony and expressly found that Liberty National required these people to attend.[32] Do we mean to imply that while the president so stated, he really didn't mean it, or that there is no "proof" that the Company would have been so harsh to one who had the temerity to decline the King's command?[33] And if we presume to do so, from whence cometh our help or competence?

In the isolation of our judicial tower we are blind indeed to all that goes on in the busy dynamic world of commerce if we do not know—either generally or from what this record teaches—about the contemporary American institution of the "organization man."[34] He is more than a fictional character. He is a modern phenomenon. One weds a wife but he marries a corporation too. Every waking hour the company's needs, the company's business, the company's welfare is drummed into this person whose inner satisfactions are likewise finally warped into the corporate image through status symbols of job assignments, titles and prerogatives.

Is one enmeshed in this complex required to risk the decisive displeasure of his superiors by the affront of

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[32] The Court formally found: "o. The Company requires those employees, agents, supervisors, superintendents, home office officials who are invited and their spouses to attend the annual meetings of the Torch Club. This requirement is not a condition of continued employment, but failure to attend without adequate reason is frowned upon and adversely affects his future promotion."

[33] Cf. Ball v. Victor Adding Machine Co., 5 Cir., 1956, 236 F. 2d 170, 179 (dissent); Matthew 22:1-14.

[34] Nothing said is intended as a disparagement of Liberty National. Testimony of its high ranking officers shows that it is abreast with modern management practices, personnel relations, business psychology and the like. Likewise the Torch Club conventions were kept on a high plane. Unlike some others, this Company has not succumbed to the other American institution—the cocktail party—and no alcoholic beverages were served at any of its functions.

declining the great honor? Is he not to be judged by the atmosphere in which he exists? With economic consequences so awesome, is it not the risk itself—the very uncertainty of the consequences—which makes his "acceptance" of corporate hospitality a matter of sheer business necessity?

This Court would not hesitate to allow deduction in full if an employee were given a peremptory written order to attend under pain of dismissal or some other form of corporate banishment. That the compulsive pressures, or the genuine apprehension of them, are more subtlety exerted does not alter things. In either case the employee responds to the hospitality of the employer because this is essential to economic security and specifically to the retention of progressive employment.

The politicians, the moralists, the psychologists, the sociologists, the psychiatrists may all deplore what has come to pass, but this is, as the Supreme Court said, "a way of life," and it is that "life in all its fullness"—with all of its absurdities and social evils—that "must supply the answer to the riddle."

For to Mr. Thomas there really never was any riddle. He was faced with no conundrum. Once he was tapped he knew he had to go. His future was uncertain, his promotion frustrated, were he to exercise a choice. As with everything else at Liberty National, Old Point Comfort, the Hotel Chamberlin with its shuffleboard, horseshoes, Ping-pong, billiards, pool and picnic area were now to be the thing he wanted most. Once there, undoubtedly one would have fun. But the decision to go was compelled. It was compelled as a matter of business necessity. It is a pressure which people every day, everywhere in America now undergo. It is ordinary in all and the worst senses.

As American as Bedloe's Island, hot dogs, Grand Canyon, Rhapsody in Blue, Chatauqua, P.T.A., Golden Gate, Rose Bowl or Wagon Train is this institution of the organization man. Mr. Thomas, a victim and a beneficiary of that system, was under overpowering business compulsion to attend. To him the ancient question "to be or not to be" was resolved by the further one "to go or not to go". His productive future depended on the answer. As a good businessman with his ear to the ground, he did not have to wait until hearing the president testify in court that the "chances of promotion is just nil" to know what the answer would have to be.

Congress used two simple terms, "ordinary" and "necessary". They more than comprehend this situation.

The extent to which Mrs. Thomas, the wife, was absorbed into this corporate image serves a dual purpose. First, it shows why her attendance had a financial business purpose distinct from a holiday. Second, it is additional proof of the extent to which the daily life of the husband, the nominal employee, was smothered by the predominate concern of what is best for the Company.

In this respect the Company was following another good American pattern that, to paraphrase an old hymn, "this is a woman's world". Women run the home. Women are the teachers, secular and religious. They are den mothers, pack mothers, tribe mothers and home room mothers. Women are the effective civic reformers. A male aspiring for high public office runs on or with his wife. And in the view of Liberty National the success of the husband-employee depends on the wife.

As with another woman this also begins at the beginning. Before an agent is hired, the District Manager must interview the applicant's wife in her home. Already the seeds of complete, unlimited, untiring, unshared loy-

alty are being planted.[35] She is given a booklet especially prepared for wives of prospective employees. The husband, if hired, is employed on a temporary basis for a trial period. At that time the wife receives a welcoming letter which transmits the President's message entitled "A Family Affair" which leaves little doubt that mother is in this too. After the husband passes his period of probation, the husband and wife each receive letters of notification that employment has become permanent. Again, nothing is casual or accidental. This letter transmits another booklet especially prepared for wives called "The Feminine Touch".[36]

But this Company does not risk another Paradise Lost so the barrage continues. The "Torch Magazine" each month, and District Manager Bulletins each week are mailed directly into the home and "in some instances the district managers mail them direct to the wives". It is no mere euphemism to regard the wife as "a partner to him in this business we are in". For in addition to this running pressure a special visit by managerial representatives is made each year in the home. In joint consultation with husband and wife the family's needs are reviewed with the Company representative and translated

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[35] The Agency Vice President testified:

"Q. If you decide to employ a man do you talk to his wife?

"A. We require that * * * our District Manager go into the home and interview the wife of every prospective agent before he is actually employed by the company. This is done to determine whether or not the man's wife would be sympathetic and helpful to him in the business he is going to be in and also for him to explain to the wife the fact this is a business that has irregular hours."

[36] The Agency Vice President described it:

"A. That booklet * * * we send to the wife at the time her husband becomes a permanent employee. The title of this book is 'The Feminine Touch' and it tells a wife in detail some of the things she can do and how she can assist her husband in becoming a successful life insurance man."

against required production through the use of Company prepared planning and budget forms.[37] What is wanted, what is needed, what may be had, finds common, single expression in the Company's welfare. As genuine as the employer's interest is, this is not regarded as corporate philanthropy. In the Company's eyes the key to the husband's success is the wife.[38]

All of this has a substantial bearing on tax deductibility. It, of course, affords ample basis for the Company to deduct its expenditures in wife cultivation. This does not automatically extend like treatment to the wife as recipient. But when the program is so well organized, the corporate wife propaganda so intense and continuous, is it not reasonable that husband and wife conclude it to

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[37] The Agency Vice President stated:

"A. * * * We believe a man's wife is a partner to him in this business we are in. We definitely feel when we hire a man we hire his wife along with him. A particular example of that is once each year when we put out our program of progress, which is the basic compensation plan for the insurance year, the plans and so on of the company for the next year, we put out some planning forms and budget forms and our managerial people go into each agent's home and with this agent and his wife they make out their budget for the next year. And this form is so made that they convert his monetary needs into production that he must produce the next year. And then of course the wife and he together keep the records on how they are progressing during the year. So we take the wife very closely into our business."

[38] The Agency Vice President stated:

"A man's wife who is not sympathetic with him in his business can have a tremendous influence on him. He would come home late and she would say why aren't you here on time, and he would say I am trying to make a living for you, an unappreciation of course that affects his morale.

Earlier he stated that less than 1% of unmarried men were hired. They rely on married men because "We find that this is a business * * * that requires an awful lot of a man. He lives in a unique type of atmosphere and he needs some ballast for his morale and it is our contention that a wife can assist tremendously and help him to keep his morale high and keep him moving and thinking positively about this business."

be imperative that when the employer beckons, the wife must respond?[39]

In assaying this we need not consider it in terms of expenditures by the wife as such. Since the husband-employee's economic future is tied into the Company through the wife, and the Company expects the wife to attend, the cost of her travel and keep is an ordinary and necessary expenditure by the husband in his own right and not merely as a vicarious agent for her.

Thus far what I have written sounds perhaps as though I think that the compulsory attendance of husband and wife was merely to satisfy the corporate ego. On the contrary, I think the evidence is overwhelming—and the Trial Court so found—that these hard-headed businessmen considered that money was best spent by sandwiching in the ceaseless company pitch with the attractions found in a delightful resort area. In other words, it is certainly not for Judges situated where we are to say that no serious business advantage was obtained by Mr. Thomas. Until the Commissioner has to bear the financial responsibility for poor management decision, how is he to say that the participants will not obtain substantial help from this 3-day enforced togetherness as a captive group? Congress did not leave it to tax collectors or judges. The congressional test is in terms of the businessman's needs and practices. The ordinarily prudent or the ordinarily hard-headed businessman with a good deal of psychology on his side may well conclude that the "com-

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[39] It bears repeating that the President testified:

"Q. Does the company expect the wives of the agents to attend [the Torch Club]?

"A. Yes, sir."

The District Court categorically found that "The Company requires those * * * agents and their spouses to attend the annual meetings of the Torch Club. * * *." See note 32, supra. And to the wife this was not all free fun. She had the added expenses of a baby sitter, a maid and, of course, the fashionable new clothes.

pany message" can best be instilled by minimizing formal business sessions and expanding the so-called "free time" for each to receive new transfusions from others whose doubts, if they exist, will hardly be expounded in this atmosphere of good will. After all, on two of the days the day ended with the Company line being drilled in at Company dinners or banquets, and each day started bright and early with "breakfast with delegates" where the bill of fare most likely was insurance as it would have been law had the participants been judges or lawyers.[40]

If the Company thought it important, if the Company required the husband (and wife) to be there, if the husband knew that he was expected and would suffer by not attending, his presence was important for two reasons. First, he would receive the benefits of this contact and instruction. Second, he would secure his job and economic future.

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[40] The Agency Vice President testified:

"Q. In planning these programs [Torch Club] what factors do you consider?

"A. Well just exactly what we are trying to do with our men, we are trying to motivate them to do a good job * * * and to use their potential ability * * *. More than that, attendance at this Torch Club gives the fellow an opportunity to know other outstanding men and exchange ideas with those people * * *. Knowledge of course is one of the purposes of the Torch Club. We of course have outstanding speakers to attend the meeting. And we try to give them instructions to go back and do an even better job when they get back home. One of the most valuable parts of the Torch Club convention is the fact that these agents come there and [get] to rub shoulders with other outstanding men in our company who are doing a good job and get the opportunity to exchange ideas * * *. And then the fact that they are there with the Home Office officials and the Directors of the company. * * * I think every man that attends a convention leaves * * * a little bit more sold on the company. I think this might be interesting as far as statistics are concerned. * * * We found that 60% * * * of our total agency organization have attended one of these Torch Club conventions and 83% of all of the men who terminated in our company have never attended one of these meetings. Eighty-three percent who terminated have never been there. So 17 percent is all who have terminated of the Torch Club organization."

It is no answer to suggest that allowance of such deductions is open to abuse. There is scarcely anything in the complex tax law that is not. Abuses can be checked and prohibited by a determination of courts, either district or tax court, applying general principles to the facts at hand.

Finally the disallowance of deductibility is contrary to the express regulation covering attendance of conventions.[41] And the Court's remand to allow a prorata deduction for Mr. Thomas' expenses while attending business meetings[42] is contrary to the express provision of § 162 (2), see note 15, *supra*, that traveling expenses includes "the entire amount expended for meals and lodging * * * while away from home * * *."

The statute states that "The entire amount expended for meals and lodging" may be deducted. This, as we have recently pointed out in **Williams v. Patterson**, 5 Cir., 1961, ... F. 2d ... [18371, Jan. 12, 1961], represents a congressional amendment to liberalize deduction to overcome niggardly rulings of the Revenue Service which attempted to limit deductibility to the **excess** of expenditures

[41] Regulation § 1.162-2(d). "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under § 162 depending on the fact and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of the deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meetings so that his is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social, or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

[42] The Court states: "The taxpayer will be allowed a prorata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses." Citing in footnote 13 Reg. 1.162-2 (b) (1), ... F. 2d ... at ....

over those which otherwise would have been incurred. In addition, since the Court finds that Mr. Thomas was engaged in his trade or business while attending these business meetings, the question arises how did he get there? It is positive, and the District Court found, that attendance in business sessions was compulsory.[43] The expense of compulsory attendance was not therefore the Smithfield ham and grits for the Company breakfast. To be there he had first to get there. That meant travel and travel meant cost. The regulations cannot take away that which the statute expressly allows. Since, on this Court's finding, Mr. Thomas was engaged in "the pursuit of [his] trade or business" while attending required business meetings held at a place "away from home", he was most certainly entitled to deduct the entire cost for meals and lodging for each of the days on which such sessions were held. For like reasons the cost of actual travel is within the express terms of the statute.

In principle[44] the Taxpayer proved, as the District Court found, overpowering business compulsion and the deductions ought to have been allowed.

I therefore respectfully dissent.

A true copy:

Test: Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit.

By Clara R. Jannes,
Deputy.

(Seal)

New Orleans, Louisiana
Apr. 24, 1961.

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[43] The Court formally found "attendance of those present upon the scheduled program is required and plaintiffs did so attend."

[44] I have not undertaken to consider specifically the item of $12.92 for the sight-seeing trip to Williamsburg, Virginia. Perhaps other considerations apply as to it.

Judgment.

Extract from the Minutes of March 16, 1961.

George D. Patterson, District Director,
of Internal Revenue,

No. 18263. versus

J. C. Thomas and Martha Thomas.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

"Brown, Circuit Judge, Dissenting."

APPENDIX C.

Filed
12th day of Aug., 1961.

/s/ Clara R. James,
Dep. Clerk of the United States
Court of Appeals.

In the United States Court of Appeals
for the Fifth Circuit.

No. 18263.

George D. Patterson,
District Director of Internal Revenue,
Appellant,

versus

J. C. Thomas and Martha Thomas,
Appellees.

Appeal From the United States District Court for the
Northern District of Alabama.

(April 12, 1961.)

On Petition for Rehearing.

Before Rives, Brown and Wisdom, Circuit Judges.

Per Curiam:

The petition for rehearing in the above-styled and numbered cause is hereby

Denied.

Judge Brown dissents.

APPENDIX D.

[Sec. 61]

Sec. 61. **Gross Income Defined.**

[Sec. 61 (a)]

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

Source: Sec. 22 (a), 1939 Code, substantially unchanged.

[Sec. 61 (b)]

(b) Cross References.—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

[Sec. 62]

Sec. 62. **Adjusted Gross Income Defined.**

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) Trade and business deductions.—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) Trade and business deductions of employees.

(A) Reimbursed expenses.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) Transportation expenses.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) Outside salesmen.—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer.

(3) Long-term capital gains.—The deduction allowed by section 1202.

(4) Losses from sale or exchange of property.—The deductions allowed by part VI (sec. 161 and following) as losses from the sale or exchange of property.

(5) Deductions attributable to rents and royalties.—The deductions allowed by part VI (sec. 161 and following), by section 212 (relating to expenses for production of income), and by section 611 (relating to depletion) which are attributable to property held for the production of rents or royalties.

(6) Certain deductions of life tenants and income beneficiaries of property.—In the case of a life tenant of property, or an income beneficiary of property held in trust, or an heir, legatee, or devisee of an estate, the deduction for depreciation allowed by section 167 and the deduction allowed by section 611.

[Sec. 162]

Sec. 162. **Trade or Business Expenses.**

[Sec. 162 (a)]

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional District, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

Source: Sec. 23 (a) (1) (A), 1939 Code.

[Sec. 162 (b)]

(b) Charitable Contributions and Gifts Excepted.—No deduction shall be allowed under subsection (a) for any contribution or gift which would be allowable as a deduc-

tion under section 170 were it not for the percentage limitations, the dollar limitations, or the requirements as to the time of payment, set forth in such section.

Source as originally enacted in the 1954 Code: Sec. 23 (a) (1) (B), 1939 Code.

Amendments:	Sec. as Amended Effective:	
P. L. 86-779, § 7 (b) ...	1-1-61	P. L. 86-779, § 7 (b): Amended Code Sec. 162 (b) by inserting "the dollar limitations," following "the percentage limitations."

[Sec. 162 (c)]

(c) Improper Payments to Officials or Employees of Foreign Countries.—No deduction shall be allowed under subsection (a) for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee.

Amendments:	Sec. as Amended Effective:	
P. L. 85-866, § 5 (a) ...	9-3-58	P. L. 85-866, § 5 (a): Redesignated subsection (c) as subsection (d) (now (e)) and added new subsection (c) to read as above.

Regulation 1.161-2.

(d) Compensation paid other than in cash.—(1) In general. If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. If the services were rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received, in the absence of evidence to the contrary.

Regulations.

§ 1.162-2. **Traveling expenses.**—(a) Traveling expenses include travel fares, meals and lodging, and expenses inci-

dent to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62 (2) (B) and the regulations thereunder.

(b) (1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly

related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

(d) Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

(e) Commuters' fares are not considered as business expenses and are not deductible.

(f) For rules with respect to the reporting and substantiation of traveling and other business expenses of employees for taxable years beginning after December 31, 1957, see § 1.162-17. [Reg. § 1.162-2.]

Regulation 1.62-1.

(c) Traveling expenses paid or incurred by an employee in connection with his employment while away from home which are deductible from gross income under part VI in computing taxable income may be deducted from gross income in computing adjusted gross income. Among the items included in traveling expenses are charges for transportation of persons or baggage, expenditures for meals and lodging, and payments for the use of sample rooms for the display of goods. See section 162 and the regulations thereunder.

Rule 52. **Findings by the Court.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).